No. 87-751

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1987

CASPAR WEINBERGER,
SECRETARY OF DEFENSE, ET AL.

Petitioners

v.

JOHN DOE

Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether an employee of the National Security Agency dismissed for "indiscriminate personal conduct with unidentified foreign nationals," for constituting a "risk of security exploitation" and "a potential security risk" is entitled to a hearing pursuant to 5 U.S.C. 7532, when 50 U.S.C. 833 is not invoked by the Agency.

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Respondent, John Doe, by and through undersigned counsel respectfully opposes the Petition for Writ of Certiorari filed by the Solicitor General of the United States for the reasons listed below.

STATUTES AND REGULATIONS

In addition to the statutes and regulations cited by Petitioner, Executive Order 10450 of April 27, 1953, 18 FR 2489, 3 CFR, 1949-1953 Comp., p. 936, applies and is set out at App. 1b-8b, and Chapter 371 of NSA Personnel Management Manual 30-2 also applies and is set out at App. 9b-15b.

STATEMENT

During the entire administrative process in this case, Respondent was never advised that he was removed "for cause" as is now alleged by the Petitioners, and which allegation appears to be the lynch pin of their argument.[1] Rather, the record clearly reflects that Respondent was

> charged with a willful disregard of Agency Security Regulations concerning association with foreign nationals. Your indiscriminate personal involvement with foreign nationals while on unofficial foreign travel is the type of exploitable personal conduct that may result in your being subjected to undue influence or duress. (Notice of Proposed Action, dated 23 November 1982, to Respondent from Virginia C. Jenkins, Director of Civilian Personnel, NSA (C.A.App. 82-84.))

By decision dated February 9, 1984, the Director of NSA found that Doe's "indiscriminate pattern of activity . . . invites the risk of security exploitation" and that Doe was "significantly flawed in his off-duty behavior and a potential security risk." Accordingly, the Director upheld the charge of "willful disregard of security regulations concerning association with foreign nationals" and approved the NSA Board of Appraisal's finding that Doe's "access to classified information was not clearly consistent with the national security." (C.A.App. 191-193.) The Government's attempt to interpret the record as one of a mere dismissal for cause as opposed to a dismissal on national security grounds is not justified and as the Court of Appeals for the District of Columbia Circuit found in its decision:

> The Agency's own justification for revoking Appellant's security clearance and terminating his employment at NSA was "national security," within the meaning given that term by the Supreme Court. See Cole v. Young, supra. * * *

(Pet. 8a.)

[1] Petitioners, on pages 8-9, suggest that Doe's requests for hearing, pursuant to 5 USC 7532, were denied because he was removed "for cause," citing C.A.App. 220-221. An examination of the record, especially pages cited by Petitioners fails to reveal any termination "for cause."

Simiarly, the District Court never held that Doe was terminated "for cause" as is now alleged (See App. B, pp. 17a-21a).

REASONS FOR DENYING CERTIORARI

I. The Decision Below Does Not Conflict with Cole v. Young.

As the Court of Appeals found, the record below shows that John Doe's security clearance for access to NSA's classified information was revoked and his subsequent termination of employment at NSA were actions taken in the interests of national security.[2] (C.A.App.

[2] Indeed, the fact that a Board of Appraisal, pursuant to 50 USC 832(b) (membership requiring special training and qualifications for security matters) was convened would seem to put the national security nature of this case beyond question.

106-108). This makes mandatory the application of 5 U.S.C. 7532.

Further, in order to satisfy Reponsdent's due process rights, the Department of Defense and NSA must comply with applicable executive orders of the President and its own regulations. Vitarelli v. Seaton, 359 U.S. 535 (1959) and Service v. Dulles, 354 U.S. 363 (1957).

The President's Executive Order 10450, implementing 5 U.S.C. 7532 (App. 1b-8b) and NSA's own regulations, Chapter 370 (pp. 36a-43a of Petition), and Chapter 371 of the NSA Personnel Management Manual (App. 9b-15b) were not adhered to by the Department of Defense and NSA. See Doe Principal Brief below, pp. 22-23 and 26-29. In Executive Order 10450, the application of 5 U.S.C. 7532 is mandated by the second "WHEREAS" paragraph and Sections 5 and 6 thereof. Special attention is called to the following language in Sections 5 and 6: "in accordance with the said act of August 26, 1950."[3]

Further, once an agency head has suspended an employee in the interests of national security under Section (c) of 5 U.S.C. 7532, it seems clear that the employee is then entitled to all of the rights and

[3]5 U.S.C. 7532 was the Act of August 26, 1950. See Pet. p. 13 and U. S. Court of appeals Decision (Pet. 5a).

procedures spelled out in Section (c)(3)(A-E). Doe was denied these.

Petitioners are not correct in stating, on page 14 of their Petition, that in Cole v. Young, 351 U. S. at 543, this Court noted a "summary removal authority granted to agency heads . . . ." Not only does page 543 of Cole v. Young, supra not specifically refer to any "summary removal authority," but the same is also clearly foreclosed by Sections (c)(3)(A)(B)(C)(D), and (E) of 5 U.S.C. 7532. (App. E of Doe principal Brief below.)[4]

The Government's arguments that Cole v. Young, 351 U.S. 536 (1956) is somehow violated by the Court of Appeals' decision is incorrect. That case involved a Veteran's Preference Eligible who was being terminated from his position as a Food and Drug Inspector on the grounds of "association with individuals reliably reported to be Communists." The issue there is whether the National Security Act of 1950 overrode his rights to a hearing appeal, etc. as a Veteran's Preference Eligible. This Court upheld his Veteran's Preference rights, ruling that national security meant "the nation's

[4]Summary suspension is authorized in the discretion of the agency head but "removal" can take place only after notice and hearing of the type ordered here by the Court of Appeals.

safety as opposed to general welfare." This case is easily distinguishable. We are here dealing with the National Security Agency itself, a most sensitive agency of the Department of Defense, and not Food and Drug Inspection.[5] We are dealing with charges of security risks stemming from close associations with alleged foreign nationals. NSA has made its election by charging Respondent and making administrative findings which relate to the nation's safety and not its general welfare. The Agency has repeatedly refused to acknowlege that it has "fired" Respondent because he is a homosexual or because it has made moral pronouncements about his lifestyle. At all times, the Agency was free to do this under its non-security personnel regulations. Instead, it has made a conscious election to terminate him as a national security risk. In these circumstances, the Congressional mandate in 5 U.S.C. 7532 must be honored.

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[5]The Cole v. Young court gave weight to the specific enumeration of government agencies in the "1950 Act," 5 USC 7532, which included the Department of Defense (351 U.S. at 541, 544, 545). Cole v. Young found it "difficult to justify" 5 USC 7532 application to employees who are not in "sensitive" positions (351 U.S. at 546). Doe was denied access to "sensitive compartmented information," and this is the reason he was fired. His position was "sensitive" under Cole.

II. Egan v. Department of Navy Does Not Create A Clear Conflict.

A reading of the Federal Circuit's Egan Opinion seems to indicate that neither party argued in favor of the application of 5 U.S.C. 7532 as Respondent argued in this case. Rather, Egan at all times sought review based on his status as a veteran in the competitive service. The Government at all times espoused the position that judicial review was unavailable with respect to a denial of a security clearance. While the Federal Circuit does assume that Section 7532 does not constitute an exclusive remedy for one who has rights before the Merit Systems Protection Board under Section 7512, the issue did not have to be decided in the case and is more of an assumption. Accordingly, Egan does not represent a precedent in conflict with the District of Columbia Circuit's decision in this case.[6]

Furthermore, a major distinguishing factor is the existence of the competitive service status of Egan. Respondent, like all NSA employees, is a member of the

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[6]Indeed, in oral argument in Egan on December 2, 1987, Deputy Solicitor General Cohen told this Court "there has been no challenge to the procedures employed by the Navy in this case."

excepted service and was a non-preference eligible employee, not entitled to a hearing before the Merit Systems Protection Board or the other rights held by competitive service employees. The mere fact that Respondent could have no judicial review had 7532 been utilized and that Egan was entitled to judicial review by virtue of his Veteran's Preference Eligible/Competitive Service Status does not create an irreconcilable conflict.

The Federal Circuit takes pains to contrast "employees subject to Section 7532 (national security)" and notes, in footnote 2, that NSA employees "can be exempt from the procedural rights granted under 5 USC 7513 . . ." (802 F.2d 1563,1567 (Fed. Cir. 1986)). This implies that a different result concerning Section 7532 might have been reached by the Egan court for a non-preference eligible NSA employee.

III. **The Decision of the District of Columbia Circuit Does Not Have the Broad Application and Ramifications Attributed to It by the Government.**

The Government argues (Pet. 10) that the decision at issue "is important to all Federal agencies concerned with national security" and goes on to argue that the ramifications of the decision benefit neither the agency, nor Respondent, nor employees in general.

As far as Respondent is concerned, one simple answer is that a hearing at Department of Defense level, as mandated by Section 7532, constitutes an independent review of action alleged to be arbitrary, capricious, and unreasonable on the part of the Agency.

Furthermore, with respect to Respondent and all employees at NSA or any other Agency in the excepted service (with the exception of veteran's preference eligibles), there is no statutory right of hearing or review by the Agency head (in this case the Secretary of Defense), except for 5 U.S.C. 7532. All said employees are thus protected by such review, and the Secretary of Defense or comparable agency head may bring to bear a certain amount of "agency expertise" in making a determination in a situation which may be considered "delicate" or one that requires agency expertise.[7]

At the District Court and Court of Appeals levels, the Government argued that the protections contained in statutes and regulations could not apply to the revocation of a security clearance. This circuitous

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[7]The petition repeatedly assumes that Section 7532 requires a summary suspension without pay, etc. Such is not the case. The suspension is discretionary. Only when removal is sought on security grounds is a hearing necessary.

argument essentially said that, even if an employee has procedural protections with respect to his removal or termination of employment, such do not apply because NSA merely revoked Doe's security clearance. It went on, however, to argue that the employee could not continue employment without a security clearance. The decision of the Court of Appeals forbids such circular reasoning. Now the Government must make an election as to whether or not to terminate the employee for "cause" under its regular personnel procedures, or for "security reasons" invoking the procedures (and protections) of Section 7532. Rather than putting an increased burden on the Government, the decision only compels the Government to be honest in its termination proceedings.

This case is an example of potential government abuse. Respondent received good or excellent ratings for his sixteen years of employment. It was only during a drug investigation with respect to which Respondent was found not to be involved that he revealed his homosexuality during a polygraph examination. Rather than face up to the issue that NSA wanted to terminate Doe because of his sexual preference, it denominated him a security risk.

As the Court of Appeals' decision (Petition, 10a) cogently notes, the Government's argument that the power

to hire implicitly confers the power to fire, cannot serve to override pre-existing statutory procedural rights. Indeed, the logical extension of such an argument would create an intolerable situation. Every time Congress creates a new agency or governmental entity, it does not intend to do away with all existing statutory termination procedures.

CONCLUSION

Respondent respectfully submits that the Government's Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served a copy of the foregoing Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, have been served, to wit: The Honorable Frank Carlucci, Secretary of Defense, Successor to Caspar Weinberger, and Lt. General William E. Odom, Director of the National Security Agency, by mailing, postage prepaid, a copy of the same to Michael K. Kellogg, Assistant to the Solicitor General, United States Department of Justice, Washington, D. C. 20530, this 8th day of December 1987.

JOHN G. GILL, JR.

United States. President.
"
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Codification of

Presidential Proclamations and Executive Orders,

January 20, 1961 — January 20, 1985

Office of the Federal Register
National Archives and Records Administration

Executive Order 10450—Security requirements for Government employment

SOURCE: The provisions of Executive Order 10450 of Apr. 27, 1953, appear at 18 FR 2489, 3 CFR, 1949–1953 Comp., p. 936, unless otherwise noted.

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.[1]

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Office of Personnel Management may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

[1] EDITORIAL NOTE: In *Cole* v. *Young*, 76 S.Ct. 861 (1955), section 1 of EO 10450 was held to be invalid if applied to every department and agency.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field pre-appointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

[Sec. 3 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency,

unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Office of Personnel Management that such person is eligible for such employment.

[Sec. 7 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in, any foreign or domestic organization, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to pre-

vent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Office of Personnel Management, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Office. The Office shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Office of Personnel Management, and other departments and agencies may use such facilities under agreement with the Office.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

[Sec. 8 amended by EO 10491 of Oct. 13, 1953, 18 FR 6583, 3 CFR, 1949–1953 Comp., p. 973; EO 10531 of May 27, 1954, 19 FR 3069, 3 CFR, 1954–1958 Comp., p. 193; EO 10548 of Aug. 2, 1954, 19 FR 4871, 3 CFR, 1954–1958 Comp., p. 200; EO 11785 of June 4, 1974, 39 FR 20053, 3 CFR, 1971–1975 Comp., p. 874; EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 9. (a) There shall be established and maintained in the Office of Personnel Management a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Office under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Office of Personnel Management information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

[Sec. 9 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Office of Personnel Management on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Office of Personnel Management on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

[Sec. 11 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked.

[Sec. 12 amended by EO 11785 of June 4, 1974, 39 FR 20053, 3 CFR, 1971–1975 Comp., p. 874]

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable

Codification of Presidential Proclamations and Executive Orders

them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Office of Personnel Management, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Office of Personnel Management shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Office of Personnel Management to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Office of Personnel Management in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the Office as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Office of Personnel Management is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

[Sec. 14 amended by EO 10550 of Aug. 5, 1954, 19 FR 4981, 3 CFR, 1954–1958 Comp., p. 200; EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 15. This order shall become effective thirty days after the date hereof.

EXHIBIT "A"

CHAPTER 371

ADVERSE PERSONNEL ACTIONS FOR REASONS OF NATIONAL SECURITY

This chapter prescribes policies and procedures governing actions to limit access to classified information, suspend and/or terminate civilian personnel of the National Security Agency for reasons of national security. "Basic '76" pages are reprinted from the First Edition of the PMM issued in 1968. Organizational designators and references have been updated.

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SECTION 1

GENERAL

1-1. Scope.—This chapter prescribes policies and procedures governing actions to limit access to classified information, suspend and/or terminate civilian personnel of the National Security Agency/Central Security Service for reasons of national security. Such actions for reasons other than national security are processed in accordance with NSAPMM Chapter 370.

1-2. Authority.—The regulations contained in this chapter are in accordance with, and pursuant to, the authority and requirements contained in the following:

a. The Internal Security Act, approved 26 August 1950 (Public Law 733, 81st Congress), 5 U.S. Code 7532, as amended.

b. Executive Order 10450, "Security Requirements for Government Employment", April 27, 1953, as amended.

c. Public Law 88-290, 26 March 1964, which amends the Internal Security Act by the addition of Title II, entitled "Personnel Security Procedures in National Security Agency".

d. Public Law 89-380, 30 March 1966, "The Back Pay Act of 1966", which amends Public Law 733 and provides certain payments and the restoration of employment benefits to employees improperly deprived thereof.

e. DoD Directive 5210.8 "Policy on Investigations and Clearance of DoD Personnel for Access to Classified Defense Information".

f. PMM Chapter 808, Personnel Security Program for employment clearance and access.

1-3. Policy.

a. *Employment and Access.*—No person shall be employed in, or detailed or assigned to, the National Security Agency, or continue to be so employed, detailed, or assigned; and no person may be employed, detailed, or assigned shall have access to any classified information; unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security. The clearance standards and requirements of PMM Chapter 808, and the employment standards of Executive Order 10450 shall be the basis for such determination.

b. *Use of Suspension and Removal Authorities.*

(1) The use of the suspension and removal procedures authorized by 5 U.S.C. 7532 shall be limited to cases involving the interests of the national security.

(2) The termination procedures prescribed in 50 U.S.C. 833 will be invoked only when the termination of employment cannot, because of paramount national security interests, be effected under any other provision of law.

(3) Maximum use will be made of Boards of Appraisal, established by NSA Regulation No. 30-4 pursuant to 50 U.S.C. 832 and DoD Directive 5210.45 to assist the Director, in discharging his personnel security responsibilities.

(4) Nothing contained herein limits or affects the responsibility and authority of the Director, or his designee, to reassign or detail persons to positions where access to classified information is limited or denied pending final determination of employability or eligibility for access to classified information.

1-4. Definitions.

a. *National Security.*—As used herein, the term "national security" refers to those activities which are directly related to the protection of the military, economic, and productive strength of the United States including the protection of the government in domestic and foreign affairs, against espionage, sabotage, subversion, and any other illegal acts which adversely affect the national defense.

b. *Classified Information.*—For purposes of this regulation, the term "classified information" means official information which has been determined to require, in the interests of national security, protection against unauthorized disclosure and which has been so designated.

1-5. Boards of Appraisal.—The Director shall refer to a duly constituted Board those cases in which he determines that there is a doubt as to an employee's eligibility for access to classified information. Authority to refer such cases has been delegated to the Assistant Director for Personnel and Security. The Board shall proceed in accordance with the provisions of NSA Regulation No. 30-4.

SECTION 2

SUSPENSION AND TERMINATION OF EMPLOYMENT

2-1. Suspension Under 5 United States Code 7532.

a. 5 U.S.C. 7532 authorizes the Secretary of Defense to summarily suspend, without pay, an civilian employee when such action is deemed necessary in the interests of national security This authority to suspend has been delegated to the Director by DoD Directive 5100.23. Prior to preparation of a letter of charges covering a proposed suspension action, the Director shall consult with the General Counsel of the Department of Defense.

b. An employee who has been suspended under 5 U.S.C. 7532 and whose termination under that Act is proposed, will be granted procedural benefits in accordance with the provisions of the Act, as follows:

(1) All suspensions will be for an indefinite period, that is, "until further notice".

(2) The 30-day time limit specified in 5 U.S.C. 7532 will be construed to mean calendar days.

(3) To the extent that the Director determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension. If it is determined that a statement can be given the employee, the statement shall include all information except that which will reveal classified security information or material, investigative methods, or the identity of confidential informants.

(4) Within 30 days after the notification, the suspended employee is entitled to submit to the Director statements or affidavits to show why he should be restored to duty.

2-2. Termination Under 5 United States Code 7532.

a. An employee may be terminated under 5 U.S.C. 7532 only by the Secretary of Defense.

b. After his suspension and before termination a permanent employee (excepted appointment without time limitation) who is a U.S. citizen, is entitled to:

(1) A written statement of the charges against him within 30 days after suspension, which may be amended within 30 days thereafter and which shall be stated as specifically as security considerations permit;

(2) An opportunity within 30 days thereafter, plus an additional 30 days if the charges are amended, to answer the charges and submit affidavits;

(3) A hearing, at the request of the employee;

(4) A review of his case by the Secretary of Defense or his designee, before a decision adverse to the employee is made final; and

(5) A written statement of the decision of the Secretary of Defense.

c. Prior to preparation of a letter of charges proposing termination of an employee pursuant to 5 U.S.C. 7532, the Director shall consult with the General Counsel of the Department of Defense.

d. The decision of the Secretary of Defense is final.

2-3. Termination Under 50 United States Code 831-835.

a. 50 U.S.C. 831-835 authorizes the Secretary of Defense to terminate the employment of any officer or employee of the NSA/CSS whenever:

(1) He considers that action to be in the interest of the United States; and

(2) He determines that the procedures prescribed in other provisions of law that authorize the termination of the employment of that officer or employee cannot be invoked consistently with the national security.

b. Termination of employment under the provisions of this law shall be recommended to the Secretary of Defense only when the above two conditions exist.

c. Determination by the Secretary of Defense to terminate under this authority is final.

SECTION 3
ADMINISTRATION

3-1. General.

a. When investigation of information discloses reasons to doubt an employee's eligibility for access to classified information, the Chief of Security will refer the case to the Assistant Director for Personnel and Security with the recommendation that there be a limitation of access pending determination of the case. This may be effected by detail or reassignment to a position not requiring such access unless immediate suspension is deemed necessary.

b. Representatives of the Civilian Personnel [redacted] will conduct any discussions with an employee concerning his access limitation, detail, reassignment, suspension or separation. Representatives of the Office of Security [redacted] may discuss the case with the employee when additional information is required in the investigation of the case.

c. A Letter of charges will be prepared and coordinated by Civilian Personnel, and official personnel actions effecting details, reassignments, suspensions and/or separations will be processed in accordance with PMM Chapter 301.

3-2. Resignation.—If an employee resigns during the investigation or processing of a security case the resignation will be accepted and processed in accordance with PMM Chapters 370 and 301. In addition, the following will apply:

a. If the employee resigns *after* he has received oral or written notice that an adverse action is proposed or has been decided upon under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, his resignation (Form 3150) will be documented to show in "Remarks" the reasons for resignation as stated by the employee and, in addition, as applicable:

(1) Resigned after being orally informed on (date) that action is being initiated to separate (or suspend) him under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, as appropriate, and consistent with E.O. 10450.

(2) Resigned after receiving written notice proposing to separate (or suspend) him under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, as appropriate, and consistent with E.O. 10450.

(3) Resigned after receiving written notice of a decision to separate (or suspend) him under the provisions of 5 U.S.C. 7532 or 50 U.S.C. 831-835, as appropriate and consistent with E.O. 10450. An employee who tenders his resignation under these circumstances *must be advised* that documentation of his resignation will include the unfavorable information shown.

b. If the employee resigns *before* he receives oral or written notice that an adverse action is proposed or has been decided upon, the Form 3150 will contain only routine data, with no reference to the unfavorable information.

c. If the employee resigns or is separated before an investigation has been completed, the Chief of Civilian Personnel will notify the Chief of Security immediately.

3-3. Corrective Actions.—Unwarranted or unjustified suspension or separation under the provisions of this Chapter will be corrected as follows:

a. Retroactive restoration after separation is effected by cancelling the separation, citing the same authority which was used to effect the separation. In addition to the required information cited in PMM Chapter 301, add the remark: "Retroactive restoration by corrective action of the Secretary of Defense". Show entitlement to back pay in accordance with PMM Chapter 351.

b. Unwarranted suspension under 5 U.S.C. 7532 is also corrected by cancellation, citing the same authority. In addition to the information cited in PMM Chapter 301, add the remark: "Retroactive restoration by corrective action by _____" (show "Director, NSA" or "Secretary of Defense" as appropriate). Show date active duty started. Show entitlement to back pay in accordance with PMM Chapter 351.

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